Arbain bin Basri v Ketua Polis Negara & Anor

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO (MT–1) 22–1 OF 2001
SYED AHMAD HELMY J
17 JULY 2007

Administrative Law — Natural justice — Rules of natural justice — Procedural fairness — Right to be heard — Confidential report — Plaintiff was never handed nor given an opportunity to rebut or explain contents of report — Whether failure to allow plaintiff to address matters raised was a blatant breach of the rules of natural justice — Federal Constitution art 135(2)

Constitutional Law — Double jeopardy — Plaintiff charged in court for two counts of failure to perform duties — Disciplinary proceedings commenced in respect of same charges — Plaintiff found guilty and dismissed from police force — Whether disciplinary proceedings exposed plaintiff to double jeopardy — Whether there had been serious transgression of art 5(1) of the Federal Constitution

Public Servants — Dismissal — Dismissal from police force — Investigative committee — Whether it was established — Whether dismissal unlawful and void — Public Officers (Conduct and Discipline) Regulations 1993 reg 28(4)

The plaintiff, who was holding the rank of Inspector in the Royal Malaysian Police, was dismissed from service by the first defendant after he was found guilty of five charges of unsatisfactory work or misconduct. The plaintiff filed this proceedings and challenged his dismissal on the ground that there was double jeopardy and mala fide in respect of the first and second charges and no basis whatsoever in relation to the 3 to 5 charges. Prior to the disciplinary action, the plaintiff was charged in the magistrate's court for failing to attend to his duties. He was however, acquitted and discharged without defence being called. The second charge was withdrawn from the magistrate's court. In the meantime, the disciplinary proceedings on the first and second charges continued and the plaintiff was found guilty and was imposed a penalty of one day's salary. Some 11 months after the withdrawal of the second charge from the magistrate's court and after the commencement of the disciplinary proceedings in respect of the above two charges, the plaintiff was issued with show cause notice in respect of five charges, two of which was similar to the

charges in the magistrate's court. The plaintiff replied to the show cause letter and the first defendant found him guilty on all five charges and accordingly, dismissed him from the Force. The plaintiff challenged the dismissal on the ground that by reason of the magistrate's court's acquittal of the first charge and the withdrawal of the second charge, there was no basis to continue with the disciplinary proceedings which had consequently exposed the plaintiff to double jeopardy. Further, the first defendant had taken into consideration the confidential report in the decision to dismiss the plaintiff and he was never handed nor given an opportunity to rebut or explain the contents of the confidential report. Issue was also raised as to whether the disciplinary body, as required by reg 28(4) of the Public Officers (Conduct and Discipline) Regulations 1993 ('Regulations'), was convened to mete out the decision of dismissal.

Held, allowing the application:

(1) Aside from the two magistrates' court actions, the plaintiff had been punished twice for the same charges by the disciplinary body at the State Contingent and the disciplinary body at Bukit Aman. The plaintiff had suffered double jeopardy having been punished twice for the same offence, a serious transgression of art 5(1) of the Federal Constitution (see para 15).

(2) The evidence showed that the confidential report was taken into consideration by the first defendant in arriving at the dismissal of the plaintiff. The said report was furnished to the first defendant before the show cause letter and it was not served on the plaintiff nor was the plaintiff informed he could request a copy of the said report. Failure to permit the plaintiff to address the matters raised in the confidential report was a blatant breach of the rules of natural justice (see paras 20–21).

(3) Regulation 28(4) of the Regulations provides for the establishment of an investigative committee to investigate matters raised by the disciplined party and based on the facts, the necessity of establishing such a committee arose so as to arrive at a neutral report to assist the disciplinary authority in its serious decision of dismissal. The failure as such was an infringement of procedural fairness. Further, in the absence of evidence as to the actual date of dismissal by the first defendant, a doubt arose as to whether the disciplinary body did convene to mete out the decision of dismissal. There must be evidence as to the actual date of decision to dismiss by the disciplinary body for the order of dismissal to be valid (see paras 26–27).

(4) The disciplinary authority had in meting out the sentence of dismissal taken into consideration the confidential report without giving the plaintiff an opportunity to rebut, contradict or explain the same and the failure to serve same on the plaintiff. Thus, on the ground of the *Wednesbury* principle, it was an appropriate case for the court to intervene and exercise its discretionary power of striking down the sentence of dismissal (see para 33).

[Bahasa Malaysia summary

Plaintif, yang pernah berjawatan sebagai Inspektor dalam Polis Di Raja Malaysia, telah dipecat daripada perkhidmatan oleh defendan pertama selepas beliau didapati bersalah dengan lima pertuduhan iaitu prestasi kerja yang kurang memuaskan atau salah laku. Plaintif telah memfailkan prosiding ini dan mencabar pemecatannya atas alasan terdapat pendakwaan dua kali dan mala fide berkaitan pertuduhan pertama dan kedua dan ketiadaan asas bagi pertuduhan ketiga dan kelima. Sebelum bermulanya tindakan tatatertib, plaintif telah dituduh di dalam mahkamah majistret kerana kegagalan dalam menjalankan tugasannya. Beliau bagaimanapun, telah dibebaskan dan dilepaskan tanpa memanggil sebarang pembelaan. Pertuduhan kedua pula telah ditarik balik daripada mahkamah majistret. Sementara itu, prosiding tatatertib bagi pertuduhan pertama dan kedua telah diteruskan dan plaintif didapati bersalah dan dikenakan penalti bersamaan sehari gaji. Sekitar 11 bulan selepas penarikan balik pertuduhan kedua daripada mahkamah majistret dan selepas bermulanya tindakan tatatertib untuk kedua-dua pertuduhan di atas, plaintif telah menerima notis tunjuk sebab bagi pertuduhan kelima, dua daripadanya adalah sama dengan pertuduhan-pertuduhan di dalam mahkamah majistret. Plaintif telah membalas surat tunjuk sebab dan defendan pertama mendapati beliau bersalah di atas kesemua lima pertuduhan dan oleh itu telah memecatnya daripada pasukan. Plaintif telah mencabar pemecatan tersebut atas alasan bahawa bersandarkan kepada pembebasannya oleh mahkamah majistret bagi pertuduhan pertama dan penarikan balik pertuduhan kedua, adalah tidak berasas untuk meneruskan prosiding tatatertib yang kesannya mendedahkan plaintif kepada pendakwaan dua kali. Selanjutnya, defendan pertama telah membuat pertimbangan berdasarkan laporan sulit dalam keputusannya memecat plaintif dan beliau tidak pernah diserahkan mahupun diberikan peluang untuk mematahkan dan menerangkan kandungan-kandungan laporan sulit tersebut. Isu yang juga dibangkitkan sama ada badan tatatertib, sebagaimana dikehendaki oleh peraturan 28(4) Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 ('Peraturan-Peraturan'), telah bersidang bagi melaksanakan keputusan pemecatan.

Diputuskan, membenarkan permohonan:

(1) Selain tindakan-tindakan kedua-dua mahkamah majistret, plaintif

telahpun dihukum sebanyak dua kali bagi pertuduhan-pertuduhan yang sama oleh badan tatatertib di kontinjen negeri dan badan tatatertib di Bukit Aman. Plaintif telah mengalami pendakwaan dua kali kerana dihukum sebanyak dua kali bagi kesalahan yang sama, satu pencabulan yang serius di bawah perkara 5(1) Perlembagaan Persekutuan (lihat perenggan 15).

(2) Keterangan menunjukkan bahawa laporan sulit telah pun dipertimbangkan oleh defendan pertama dalam membuat keputusan pemecatan plaintif. Laporan tersebut telah diberikan kepada defendan pertama sebelum surat tunjuk sebab dan ia tidak diserahkan kepada plaintif mahupun memaklumkan kepada plaintif bahawa beliau boleh meminta salinan laporan tersebut. Kegagalan membenarkan plaintif mengemukakan perkara-perkara yang dibangkitkan dalam laporan sulit adalah terang-terangan melanggar peraturan-peraturan keadilan asasi (lihat perenggan 20–21).

(3) Peraturan 28(4) Peraturan-Peraturan memperuntukkan penubuhan satu jawatankuasa penyiasat bagi menyiasat perkara-perkara yang dibangkitkan oleh pihak tatatertib dan berdasarkan kepada fakta-fakta, keperluan menubuhkan jawatankuasa tersebut ditimbulkan agar dapat membuat laporan yang berkecuali bagi membantu pihak berkuasa tatatertib dalam keputusan berat berkaitan dengan pemecatan. Kegagalan seperti itu adalah pencabulan tatacara kesaksamaan. Selanjutnya, ketiadaan keterangan berkaitan tarikh sebenar pemecatan oleh defendan pertama, keraguan telah timbul sama ada badan tatatertib telah pun bersidang bagi melaksanakan keputusan pemecatan. Mestilah terdapat keterangan yang berkaitan dengan tarikh sebenar keputusan pemecatan oleh badan tatatertib bagi menjadikan perintah pemecatan tersebut adalah sah (lihat perenggan 26–27).

(4) Pihak berkuasa tatatertib yang melaksanakan hukuman pemecatan telah mengambilkira laporan sulit tanpa memberikan plaintif peluang untuk menjawab, menyanggah atau menerangkannya dan gagal menyerahkan laporan sulit tersebut kepada plaintif. Oleh itu, berdasarkan kepada prinsip *Wednesbury*, ia adalah kes yang sesuai untuk mahkamah campur tangan dan menggunakan kuasa budi bicara untuk menolak hukuman pemecatan (lihat perenggan 33).]

Notes

For a case on double jeopardy generally, see 3(2) *Mallal's Digest* (4th Ed, 2006 Reissue) para 1956.

For a case on rules of natural justice, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) para 229.

For cases on dismissal from Police Force, see 10 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1911–1914.

Cases referred to

Azman bin Abdullah v Ketua Polis Negara [1997] 1 MLJ 263 (refd)
B Surinder Singh Kanda v The Government of the Federation of Malaya [1962] MLJ 169 (refd)
Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara Malaysia & Anor [1994] 2 MLJ 114 (refd)
Harry Lee Wee v Law Society of Singapore [1985] 1 MLJ 1 (refd)
Inspector-General of Police & Anor v Alan Noor bin Kamat [1988] 1 MLJ 260 (refd)
Karem Mohamed v Ketua Polis Negeri Perlis dan satu lagi [2003] 5 CLJ 235 (refd)
M Sentivelu a/l R Marimuthu v Public Services Commission Malaysia & Anor [2005] 5 MLJ 393 (refd)
Ng Hock Cheng v Pengarah Am Penjara & Ors [1998] 1 MLJ 153 (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (refd)
Ridge v Baldwin [1964] AC 40 (refd)
Shamsiah bte Ahmad Sham v Public Commission, Malaysia & Aner [1990] 3 MLJ 364 (refd)
Yap Jack Keet v Ketua Polis Negara & Anor [2000] 7 MLJ 189 (refd)
Zakaria bin Abdul Rahman v Ketua Polis Negara Malaysia & Anor [2001] 3 MLJ 385 (refd)

Legislation referred to

Federal Constitution arts 5(1), 135(2)
Public Officers (Conduct and Discipline) Regulations 1993 reg 28(4)

Maniam Nair (Maniam Nair & Co) for the plaintiff.
Suzana Atan (Senior Federal Counsel, Attorney General's Chambers) for the defendants.

Syed Ahmad Helmy J:

[1] The plaintiff who was holding the rank of Inspector in the Royal Malaysian Police was on the 18 February 1998 dismissed by the first defendant after he was found guilty of five charges of unsatisfactory work or misconduct. The plaintiff filed the present proceeding and challenged his dismissal on five grounds.

[2] The first ground of challenge was there was double jeopardy and mala fide in respect of the first and second charges and no basis whatsoever in relation to the three to five charges. The five charges are as follows:

ALASAN PERTAMA

Bahawa anda sebagai pegawai awam iaitu inspektor dalam pasukan Polis Diraja Malaysia dan ketika itu bertugas sebagai pegawai penyiasat 'A' team Ibupejabat Polis Daerah Johor Bahru, telah didapati tidak bertanggungjawab iaitu anda telah tidak menjalankan tugas-tugas hakiki sebagai pegawai penyiasat 'A' team Ibupejabat Polis Daerah Johor Bahru pada tarikh-tarikh yang dinyatakan di lampiran 'A', maka dengan hal yang demikian anda telah melanggar tatakelakuan di bawah peraturan 4(2)(g) Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 yang berbunyi seperti berikut:

4(2) Seseorang pegawai tidak boleh —

(g) tidak bertanggungjawab.

ALASAN KEDUA

Bahawa anda sebagai pegawai awam iaitu inspektor dalam pasukan Polis Diraja Malaysia dan ketika itu Ibupejabat Polis Daerah Johor Bahru, telah didapati tidak bertanggungjawab iaitu anda telah tidak menjalankan tugas-tugas hakiki sebagai pegawai penyiasat 'A' team Ibupajabat Polis Daerah Johor Bahru pada tarikh-tarikh yang dinyatakan di lampiran 'B', maka dengan hal yang demikian anda telah melanggar tatakelakuan di bawah peraturan 4(2)(g) Peraturan-Peraturan Pegawai Am (Kelakuan dan Tatatertib) 1993, yang berbunyi seperti berikut:

4(2) Seseorang pegawai tidak boleh —

(g) tidak bertanggungjawab.

ALASAN KETIGA

Bahawa anda sebagai pegawai awam iaitu inspektor dalam pasukan Polis Diraja Malaysia dan ketika itu bertugas sebagai pegawai penyiasat 'A' team Ibupejabat Polis Daerah Johor Bahru, telah didapati ingkar perintah iaitu anda telah tidak membuat catatan pergerakan dan penugasan dalam Buku Perharian Rasmi (Pol4) tahun 1991 bagi tempoh 16.11.1991 hingga 31.12.1991, iaitu seperti yang dikehendaki oleh perenggan 9, Perintah Tetap Ketua Polis Negara A 121, maka dengan hal yang demikian anda telah melanggar tatakelakuan di bawah peraturan 4(2)(i) Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993, yang berbunyi seperti berikut:

4(2) Seseorang pegawai tidak boleh —

(i) ingkar perintah atau berkelakuan dengan apa-apa cara yang boleh ditafsirkan dengan munasabah sebagai ingkar peritah.

ALASAN KEEMPAT

Bahawa anda sebagai pegawai awam iaitu Inspektor dalam pasukan Polis Diraja Malaysia dan ketika itu bertugas sebagai pegawai penyiasat 'A' team Ibupejabat Polis Daerah Johor Bahru, telah didapati ingkar perintah iaitu anda telah tidak

mengemukakan Buku Perharian Rasmi (Pol4) kepada pegawai penyelia sebelum 5 haribulan pada tiap-tiap bulan mulai Januari 1991 hingga Disember 1991, iaitu seperti yang dikehendaki oleh perenggan 8, Perintah Tetap Ketua Polis Negara A 121, maka dengan hal yang demikian anda telah melanggar tatakelakuan di bawah peraturan 4(2)(i) Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993, yang berbunyi seperti berikut:

4(2) Seseorang pegawai tidak boleh —

(i) ingkar perintah atau berkelakuan dengan apa-apa cara yang boleh ditafsirkan dengan munasabh sebagai ingkar peritah.

ALASAN KELIMA

Bahawa anda, sebagai pegawai awam iaitu inspektor dalam pasukan Polis Diraja Malaysia dan ketika itu bertugas sebagai pegawai penyiasat 'A' team Ibupejabat Polis Daerah Johor Bahru, telah didapati ingkar perintah iaitu anda telah tidak memelihara dan mengekalkan Buku Perharian Rasmi (Pol4) bagi tahun 1992, 1993 dan 1994 iaitu seperti yang dikehendaki oleh perenggan 8, Perintah Tetap Ketua Polis Negara A 121, maka dengan hal yang demikian anda telah melanggar tatakelakuan di bawah peraturan 4(2)(i) Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993, yang berbunyi seperti berikut:

4(2) Seseorang pegawai tidak boleh —

(h) ingkar perintah atau berkelakuan dengan apa-apa cara yang boleh ditafsirkan sebagai munasabah sebagai ingkar perintah.

[3] The essence of the first charge was that the plaintiff failed to perform his duties as investigating officer of team 'A' for the period 27 October 1991 to 18 November 1991.

[4] Prior to the disciplinary action on the first charge aforesaid the plaintiff was charged in the Magistrates Court Johor Bahru in Case No 83–398 of 1992 ('first magistrate court action') for failing to attend to his duties as investigating officer of team 'A' for the same period, 27 October 1991 to 18 November 1991.

[5] The plaintiff was acquitted and discharged without defence being called of the first magistrate court action on 7 April 1994 and plaintiff was called to resume duty in team 'C' of Commercial Crime Department. The prosecution filed an appeal but was subsequently withdrawn on 20 June 1994 and the plaintiff was transferred to the Batalion 6 Pasukan Gerakan Am Bakri Muar, Johor as platoon commander.

[6] Whilst serving as the platoon commander the plaintiff was on 16 March 1995 charged in the Johor Bahru Magistrate Court (B) in Case

No B82–2 of 1995 ('second magistrate court action') for failing to attend to his duties for a period of 21 days from 12 March 1992 to 2 November 1993. A

[7] This second charge in the second magistrate court was withdrawn by the prosecution on 31 July 1996 and plaintiff resumed his duties with Batalion 6, Pasukan Gerakan Am Bakri, Muar. B

[8] Prior to the withdrawal of the second charge of the magistrate court's action disciplinary proceedings on the first and second charges continued whereupon on 15 June 1995 he was found guilty and was imposed a penalty of one day's salary. C

[9] On 23 May 1997 ie, some 11 months after the withdrawal of the second magistrate court action and after the commencement of the disciplinary proceedings on 15 June 1995 in respect of the two charges, the plaintiff was issued with show cause notice in respect of five charges, two of which was similar to the charges in the first and second magistrate court actions. D

[10] On 30 June 1997 the plaintiff replied to the show cause letter of 23 May 1997 and on 18 February 1998 the first defendant found him guilty on all five charges and the plaintiff was dismissed from the force. E

[11] In the light of the aforesaid learned counsel for the plaintiff submits that the dismissal is wrongful in law by reason of the fact that the first charge which is similar to the charge in the first magistrate court action the magistrate court had after a full trial found him not guilty and the prosecution's appeal was withdrawn and the second charge which is similar to the charge in the second magistrate court action had been withdrawn. Hence by reason of the magistrate court's acquittal of the plaintiff of the first charge and the withdrawal of the second charge in the second magistrate court action there is no basis for the first respondent to continue with the disciplinary proceedings which has consequently exposed the plaintiff to double jeopardy. F G H

[12] Further it is contended by learned counsel for plaintiff that the evidence adduced clearly shows that aside from the similarity of the charges in the magistrate court action and the disciplinary proceedings the plaintiff had been punished twice for the same charges by the disciplinary body at the State Contingent level and also by the headquarters in Bukit Aman and refers to the document appearing on p 10 of bundle H. I

[13] As regards the three other charges learned counsel submits that it relates to entries in the 'Perharian Rasmi' which is connected to the first two

charges and since the first two charges have been held to be wrongful the three charges should also be struck down.

[14] In support of its submission aforesaid learned counsel for the plaintiff relied on the case of *Harry Lee Wee v Law Society of Singapore* [1985] 1 MLJ 1 for the proposition that the doctrine of autrefois convict and acquit is applicable to disciplinary proceedings which was applied in the case of *Zakaria bin Abdul Rahman v Ketua Polis Negara Malaysia & Anor* [2001] 3 MLJ 385.

[15] On the issue of double jeopardy upon evaluating the evidence it is my finding that aside from the two magistrate court actions the plaintiff has been punished twice for the same charges by the disciplinary body at the State Contingent and the disciplinary body at Bukit Aman. This is reflected by the document appearing on p 10 of 'Ikatan H' which expressly states that on 15 June 1995 the State Contingent had found him guilty of the charge relating to JB Report 23417/93 and fined him a day's salary. The attempt by learned federal counsel to persuade me that the punishment meted out by the State Contingent is in relation to a different show cause letter dated 2 March 1994 for a charge of 'Kesalahan Pengendalian Barang' in connection with Kulai Report No 1957/89 as appears in the several documents appearing in 'Ikatan I' and that there was a typographical error in p 10 of 'Ikatan H' as advanced through the testimony of DWS-4 (Tan Sri Abdul Rahim bin Mohd Noor) cannot be accepted as the maker was never called, the net effect of which there is no rebuttal evidence and the plaintiff has suffered double jeopardy having been punished twice for the same offence and serious transgression of art 5(1) of the Federal Constitution.

[16] It is also pertinent to note while the disciplinary proceedings and the magistrate's court action was on going a 'Laporan Prestasi Tugas' was issued by the 'Pegawai Pemerintah, Bt 6 Pasukan Polis Hutan' to the DPP on 13 December 1995 supporting the performance and conduct of the plaintiff. The plaintiff was also issued with two letters on 25 March 1997 and 12 May 1997 of his exemplary performance, dedication and responsibility as platoon head which to my mind is a telling piece of evidence of his performance and responsible conduct.

[17] Second and fourth issue — breach of art 135(2) of the Federal Constitution and reg 28(4) of the Public Officers (Conduct and Discipline) Regulations 1993.

[18] The plaintiff's challenge on the second and fourth issues which is taken together is that the plaintiff was not given a reasonable opportunity to be heard which is constitutionally provided for by art 135(2) of the Federal

Constitution in that the first defendant had taken into consideration the confidential report in the decision to dismiss the plaintiff and the plaintiff was never handed nor given an opportunity to rebut or explain the contents of the confidential report. Furthermore the failure by the respondent to form an Investigation Committee to investigate the allegation and explanation of the plaintiff in his reply to the show cause letter of his strained relationship with DW2, DSP Megat Aminuddin bin Megat Wali and his explanation and clarification of the five charges contravened reg 28(4) of the Public Officers (Conduct and Discipline) Regulations 1993.

[19] The defendants in refuting the plaintiff's challenge submitted that the plaintiff was given a reasonable opportunity to be heard and there is no contravention of both art 135(2) of the Federal Constitution and r 28(4) of the Public Officers (Conduct and Discipline) Regulations 1993 and relies on the case of *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara Malaysia & Anor* [1994] 2 MLJ 114.

[20] Turning to the evidence herein it is my finding that the confidential report was taken into consideration by the first defendant ie, SD4 in arriving at the decision of dismissal of the plaintiff. This is borne out by the evidence of both SD3 and SD4. SD3 testified that the confidential report was furnished to SD4 as the 'Ketua Polis Negara' before the show cause letter and that it was not served on the plaintiff nor was the plaintiff informed that he could request a copy of the said report. The evidence of SD3 was acknowledged by SD4 in cross-examination that aside from the confidential report he was also handed the plaintiff's service record and the file pertaining to the disciplinary investigation and the confidential report which was not handed to the plaintiff was taken into consideration by him in arriving at his decision to dismiss the plaintiff.

[21] That being the case the failure of permitting the plaintiff to address the matters raised in the confidential report is a blatant breach of the rules of natural justice as propounded in the celebrated case of *Ridge v Baldwin* [1964] AC 40 where Lord Morris stated:

> It is well established that the essential requirements of natural justice at least include that before someone is condemned he is to have an opportunity of defending himself and in order that he may do so that he is to be made aware of the charges or allegations or suggestions which he has to meet ...

Hence if the party has no knowledge of the allegations which he has to meet the right to a hearing becomes illusory.

[22] The sage words of Lord Denning in *B Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] MLJ 169 at pp 169 and 172–173 merits reproduction.

> ... If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn LC in *Board of Education v Rice* [1911] AC 179 down to the decision of Their Lordship's Board in *Ceylon University v Fernando* [1960] 1 WLR 223. It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The court will not enquire whether the evidence or representations did work to his prejudice. Sufficient that they might to do so. The court will not go into the likelihood of prejudice. The risk of it is enough ...

[23] The Privy Council decision in *B Surinder Singh Kanda*'s case was approved and applied in the Supreme Court case of *Shamsiah bte Ahmad Sham v Public Commission, Malaysia & Aner* [1990] 3 MLJ 364 where Jemuri Serjan SCJ stated at p 369:

> ... It was manifestly demonstrated to us that the first respondent had infringed the rule of natural justice in not affording the appellant the opportunity to explain or controvert her record of service which played a part in influencing its decision to impose the severest punishment permissible under the 1969 Regulations. On this ground based on the authorities cited in the judgment, the court had no alternative but to allow the appeal ...

[24] In *Shamsiah*'s case the disciplinary authority in arriving at its decision took into account the appellant's record of past conduct without giving her an opportunity to explain or controvert its contents. The Supreme Court found that in not having afforded her the opportunity, the respondent had infringed the rules of natural justice.

[25] The authorities establishes that where a disciplinary authority has taken into account matters which was never made known to the person affected by such matters so as to give him an opportunity to comment on it, or to controvert it, such failure was not to be regarded as s pure technicality — it constituted the breach of a fundamental right namely the right to be heard, see *Yap Jack Keet v Ketua Polis Negara & Anor* [2000] 7 MLJ 189.

[26] As regards reg 28(4) of the Public Officers (Conduct and Discipline) Regulations 1993 the wording thereof provides for the establishment of an Investigative Committee to investigate matters raised by the disciplined party and in the context of the factual matrix herein the necessity of establishing such a committee arises so as to arrive at a neutral report to assist the disciplinary authority in its serious decision of dismissal. The failure as such is an infringement of procedural fairness.

[27] Furthermore, I am persuaded by the plaintiff's counsel submission in the absence of evidence as to the actual date of dismissal by the first defendant, as acknowledged by SD4 a doubt arises as to whether the disciplinary body did convene to mete out the decision of dismissal. To my mind there must be evidence as to the actual date of decision to dismiss by the disciplinary body for the order of dismissal to be valid.

THIRD ISSUE OF CONDONATION

[28] It is the plaintiff's submission that the five charges against him in the disciplinary proceedings was for the period 1991 to 1994 but disciplinary proceedings was only initiated on 23 May 1997 and decision for dismissal made on 18 February 1998 and hence the doctrine of condonation applies and relies on *Azman bin Abdullah v Ketua Polis Negara* [1997] 1 MLJ 263 (CA); *Inspector-General of Police & Anor v Alan Noor bin Kamat* [1988] 1 MLJ 260; and *M Sentivelu a/l R Marimuthu v Public Services Commission Malaysia & Anor* [2005] 5 MLJ 393.

[29] From the evidence adduced I am of the view that the doctrine of condonation in the factual matrix herein has no application. This is because the sequence of events clearly establishes that the second magistrate's court action in relation to the second charge was initiated on 16 March 1995 and the disciplinary proceedings at the State Contingent level on the first and second charge was initiated three months later on 15 June 1995. In any event there is no time limit stipulated in the Public Officers (Conduct and Discipline) Regulations 1993 for commencement of disciplinary proceedings.

FIFTH ISSUE — SENCENCE METED OUT UNREASONABLE — WEDNESBURY PRINCIPLE

[30] It is the plaintiff's counsel submission that in the light of the plaintiff's service of 29 years in the Police Force the dismissal is unreasonable based on the *Wednesbury* principle.

[31] The *Wednesbury* principle was appropriately summarised by Edgar Joseph Jr FCJ in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 at p 187.

> ... In this context, it is useful to note how Lord Diplock (at pp 410–411) defined the three grounds of review, to wit, (i) illegality (ii) irrationality and (iii) procedural impropriety. This is how he put it:
>
> > ... By 'irrationality' I mean what can by now succinctly referred to as '*Wednesbury* unreasonableness'... It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied

A his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong, with our judicial system ... 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review...

B

[32] Though I concede that the disciplinary authority is the most appropriate body to mete out the prescribed punishment as laid down by the Federal Court in *Ng Hock Cheng v Pengarah Am Penjara & Ors* [1998] 1 MLJ 153 nevertheless in certain exceptional circumstances the court can intervene in the punishment as meted out.

C

[33] In the factual matrix herein in the light of my finding that the disciplinary authority had in meting out the sentence of dismissal taken into consideration the confidential report without giving the plaintiff an opportunity to rebut, contradict or explain same and the failure to serve same on the plaintiff, it is an appropriate case for this court to intervene and exercise its discretionary power of striking down the sentence of dismissal on the ground of the *Wednesbury* principle. The confidential report which the plaintiff was not given an opportunity to rebut contradict or explain is an extraneous circumstance which warrants the court to intervene — *Karem Mohamed v Ketua Polis Negeri Perlis dan satu lagi* [2003] 5 CLJ 235.

D

E

F **[34]** By reason aforesaid I allowed the plaintiff's claim herein and there shall be an order in terms of prayers 31(a), (b), (c), (e) and (f) of the statement of claim — the prayers in prayer 31(b) to be assessed before the deputy registrar. The interest as prayed in prayer 31(f) is 8% from the date of judgment until settlement.

G

Application allowed.

Reported by Ashgar Ali Ali Mohamed

H

I